

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: . Case No. 01-1139 (JKF)
W.R. GRACE & CO., .
et al., .
Debtors. .
USX Tower - 54th Floor
600 Grant Street
Pittsburgh, PA 15219
February 11, 2011
4:04 p.m.
.

TRANSCRIPT OF TELEPHONIC CONFERENCE
BEFORE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY COURT JUDGE

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1 THE COURT: Good afternoon. This is the matter of
2 W.R. Grace, Bankruptcy Number 01-1139 pending in the District
3 of Delaware.

4 The Court scheduled this status conference because
5 I've been getting several emergency motions. And I believe
6 having done some research with respect to my authority that I
7 needed the status conference to make sure that no party is
8 prejudiced as a result of what I believe my authority is. And
9 as a result, there were initially three matters scheduled for
10 status conference, but a fourth has been filed; and that is, a
11 motion for expedited consideration of the Anderson Memorial
12 Hospital's motion to extend various times. It's at Docket
13 Number 26247. And excuse me one minute.

14 || (Pause)

15 THE COURT: Okay, thank you. I do not have a list of
16 participants. So, if we could please start with the debtor
17 who's present.

18 MS. BAER: Good afternoon, Your Honor. Janet Baer on
19 behalf of the debtor.

20 MR. DONLEY: John Donley and Adam Paul on behalf of
21 the debtor, as well.

22 MR. O'NEILL: James O'Neill on behalf of the debtor,
23 Your Honor.

24 THE COURT: Anyone else?

25 MR. FRANKEL: Roger Frankel and Rick Wyron for the

1 PI, FCR.

2 MR. BENTLEY: Philip Bentley and David Blabey for the
3 Equity Committee.

4 THE COURT: Wait, I'm sorry. Mr. Bentley and who?

5 MR. BENTLEY: David Blabey.

6 THE COURT: Oh, Mr. Blabey, thank you.

7 MS. CURRIER: And Teresa Currier from Saul Ewing
8 for the Equity Committee, also.

9 THE COURT: Thank you.

10 MR. LOCKWOOD: Peter Lockwood for the AC -- PI, ACC.

11 MR. BAENA: Scott Baena for the Property Damage
12 Committee.

13 MR. RICH: Alan Rich for the Property Damage FCR.

14 MR. TACCONELLI: Theodore Tacconelli for the Property
15 Damage Committee.

16 MR. SANDERS: Alex Sanders, PD, FCR.

17 MS. DAVIS: Kathleen Davis for the ACC.

18 MR. PASQUALE: Ken Pasquale and Arlene Krieger, Your
19 Honor, for the Official Creditors' Committee.

20 THE COURT: I'm sorry, Mr. Pasquale, I couldn't hear
21 you. There were a couple of people talking at the same time.

22 MR. PASQUALE: My apologies, Your Honor. I'm not
23 sure what order we're going in. It's Ken Pasquale and Arlene
24 Krieger from Stroock for the Official Creditors' Committee.

25 THE COURT: Thank you. Next?

1 MR. ROSENBERG: Andrew Rosenberg from Paul Weiss for
2 the bank lenders.

3 MR. COBB: Richard Cobb from Landis Rath and Cobb for
4 the bank lenders.

5 MR. SHINER: Michael Shiner, Tucker Arensberg for AXA
6 Belgium, a successor to Royal Belge, a certain London market
7 company.

8 MR. BROWN: Michael Brown for Geico and Republic.

9 MR. MONACO: Your Honor, Frank Monaco and Kevin
10 Mangan on behalf of the State of Montana and Her Majesty, the
11 Queen, in Right of Canada.

12 MR. TURETSKY: Your Honor, David Turetsky of Skadden
13 Arps for Sealed Air.

14 MR. WORF: Richard Worf and Brett Fallon for Garlock
15 Sealing Technologies.

16 MS. CASEY: Linda Casey for BNSF Railway.

17 THE COURT: I'm sorry. There are two of you speaking
18 and I can't hear either one of you as a result. So one -- I
19 don't know who you are, so I can't ask you to mention your
20 names. I couldn't pick that up. After Ms. Casey, could
21 somebody enter an appearance please?

22 MR. COHN: Your Honor, Daniel Cohn of -- I'll stop.

23 THE COURT: Mr. Cohn, go ahead.

24 MR. COHN: Yes. Daniel Cohn of Murtha Cullina, LLP
25 representing the Libby Claimant. Thank you, Your Honor.

1 THE COURT: Okay, who's next?

2 MR. PHILLIPS: Your Honor, this is Jack Phillips of
3 Phillips Goldman and Spence on behalf of the PI, FCR.

4 THE COURT: Is anyone on for Anderson Memorial?

5 MR. ROSENDORF: Good afternoon, Your Honor. David
6 Rosendorf from Kozyak, Tropin and Throckmorton for Anderson.

7 MR. McDANIEL: Garvan McDaniel for Arrowwood.

8 MR. HOGAN: Daniel Hogan on behalf of the Canadian
9 Zonolite claimants.

10 MR. HORKOVICH: Bob Horkovich, insurance counsel to
11 the ACC.

12 MR. ROSENBLUM: David Rosenbloom and Nathan Coco for
13 Fresenius Medical Care.

14 THE COURT: Anyone else?

15 (No audible response)

16 THE COURT: All right. I'm going to read the list
17 that I have to make sure I've got everyone. Baer, Donley,
18 Paul, O'Neill, Frankel, Wyron, Bentley, Blabey, Lockwood, Baena
19 -- I'm missing someone -- Tacconelli, Rich, Sanders, Davis,
20 Pasquale, Krieger, Rosenberg, Shiner, Cobb, Brown, Monaco,
21 Mangan, Turetsky, Worf, Fallon, Casey, Cohn, Phillips,
22 Rosendorf, Daniel Hogan, Horkovich, Rosenbloom, Coco. Anyone
23 else?

24 MR. LONGOSZ: Your Honor, Edward Longosz on behalf of
25 Maryland Casualty.

1 MR. WISLER: And Jeffrey Wisler on behalf of Maryland
2 Casualty.

3 MR. IFFT: And Richard Ifft on behalf of Maryland
4 Casualty.

5 MS. CURRIER: And Teresa Currier also here for the
6 Equity Committee.

7 THE COURT: Anyone else?

8 (No audible response)

THE COURT: Okay. Let me begin then with the, I
guess three significant things. The debtor has asked for
clarification of the confirmation order. AXA Belgium has asked
for an extension of time to file either 9033 motions or appeals
and Anderson Memorial has filed the same type of requests. And
frankly, folks, it seems to me that it makes some time to give
you time to get past the status conference before you have to
file anything further anywhere. But, here's the problem. I
have the authority under Rule 9033 to extend that time to file
whatever objections you may choose to file, but I do not
believe I have the authority to extend the time to file
appeals, because Bankruptcy Rule 8002(c)(1)(F), I believe -- is
that -- one second, let me get my code and rules.

22 || (Pause)

23 THE COURT: 8002(c)(1)(F) indicates that to the
24 extent that the order that the Court entered was a confirmation
25 order, the Court does not have the time to extend the right to

1 file an appeal.

2 So, here's the issue. The issue is as framed by
3 everyone is, what did I enter, a final order or not a final
4 order? The difficulty in addressing that issue, of course, is
5 the 524(g) injunction. Because any issues that this Court
6 addresses concerning personal injury claims are within the
7 non-core jurisdiction of the Court, but not within the core
8 jurisdiction. So, as to any findings and requests to issue a
9 524(g) injunction, as I understand the application of the law,
10 that is not final. So, even though the confirmation is a core
11 proceeding, I don't see any other way but to recommend to the
12 District Court that it actually confirm the plan and issue the
13 524(g) injunction, because otherwise I think I put everybody in
14 the position of having to file appeals on core matters and Rule
15 9033 objections on non-core matters, and heaven only knows what
16 that would lead to.

17 So, it seems to me that the best thing to do is to
18 issue a report and recommendation, period, and let the District
19 Court determine whether the plan ought to be confirmed and a
20 524(g) injunction issued. That's what I attempted to do.
21 Whether I succeeded, I guess that's not up to me to determine.
22 But, that's what I attempted to do. I'm happy to extend
23 whatever I can extend, but I'm concerned about if I do enter an
24 order that extends the time to file an appeal and as a result
25 someone is misled and misses an appeal deadline that you may be

1 jeopardized as a result, and I don't think that would be
2 appropriate. So, that's why I scheduled this status
3 conference. Let me know what your preference is. I will
4 extend whatever deadlines I can. But, I do not think I can
5 extend the deadline to file appeals.

6 MR. LOCKWOOD: Your Honor, BNSF has filed a motion to
7 reconsider. And I believe under the rules that that
8 automatically holds, if you will, the time for filing appeals
9 until the motion to reconsider is passed on. This is Peter
10 Lockwood.

11 THE COURT: Well, it sure will as to BNSF, Mr.
12 Lockwood. I can't disagree. If everybody wants to weigh in on
13 the BNSF motion so that the motion for reconsideration will
14 apply, in general, to the plan confirmation order, I think
15 you're correct. That would extend the time until that hearing
16 is determined. And that may be all you need to get you past
17 the status conference. You know, it seems to me that you folks
18 ought to work out with the District Court how the proceedings
19 should go from here, not with me. He may have some different
20 view than I have, and he's the one who's going to have to hear
21 the matter. So, you ought to work that out with him. It's
22 just that I don't want to mislead somebody by entering an order
23 I have no jurisdiction to enter and then having somebody miss
24 an appeal period as a result. So --

25 MR. LOCKWOOD: Your Honor, could we -- I mean, I

1 don't know whether -- the timing on this. But, I think that
2 the plan proponents would like to speak at either Monday, if
3 that would be better, or now on this issue about whether Your
4 Honor has jurisdiction to issue the confirmation order under
5 524(g), because, (a) we think you do, and (b) we know that
6 you've done it in a whole lot of other cases.

7 THE COURT: Well, Mr. Lockwood, I don't think it's an
8 issue of jurisdiction. I think that, you know, this Court
9 clearly has core jurisdiction, and the 524(g) injunction is
10 just a supplement to the other plan confirmation order. The
11 problem is that it's non-core.

12 If you take a look at Section 157 -- I'm sorry, I got
13 a new code and I haven't found anything in it yet, and my old
14 one disappeared. So, just a second while I find Title 28 now.

15 (Pause)

16 THE COURT: Okay, I'm sorry. If you take a look at
17 Section 157(b)(2)(O), it states that core proceedings include,
18 but are not limited to, other proceedings affecting the
19 liquidation of the assets of the estate or the adjustment of
20 the debtor/creditor or the equity security holder relationship,
21 except personal injury or wrongful death claims.

22 It seems to me -- I mean, there's core jurisdiction
23 to estimate these claims, I think the later in the statute
24 under Section 5, it's clear that the Court has jurisdiction to
25 deal with personal injury claims other than to try them. But,

1 it's also clear as a result of -- I wanted the little one, the
2 little (indiscernible) book -- but it's clear that under
3 Section 157(b)(2)(o) that whatever I do is not core. So, yes,
4 do I have jurisdiction? Yes, I do. But I can't enter it as a
5 final order. I can only enter it as a recommendation. So --

6 MR. LOCKWOOD: Your Honor, 157 is sort of a catchall.
7 The 524(g) itself specifically says that the Court that issues
8 a confirmation order --

9 THE COURT: I understand.

10 MR. LOCKWOOD: -- may issue the injunction, as well.

11 THE COURT: I understand that. And it also says that
12 the injunction isn't final until after the appeal time is run.
13 So, I don't disagree that I have jurisdiction. The issue is
14 the type of jurisdiction. The fact that 157 says I can issue
15 it doesn't mean that I can issue it as a final order, I don't
16 think, Mr. Lockwood.

17 The problem is, I don't want to catch somebody in the
18 middle. And if I issue it as the final order and it's not
19 final then, you know, that may have some adverse consequences,
20 too. And I think that it's pretty clear under 157(o) that
21 issues related to personal injury are not core. So, I don't
22 know how else to do it but to recommend to the District Court
23 --

24 MR. LOCKWOOD: Except that the exception modifies the
25 phrase, other proceedings affecting the liquidation of the

1 assets of the estate, which this doesn't do, or the adjustment
2 of the debtor/creditor relationship. And it doesn't -- I can
3 see how you might contemplate that the 524(g) injunction
4 somehow or another affects the adjustment of the
5 debtor/creditor relationship. But, that, in effect, would
6 suggest that Congress is sort of sweeping up the 524(g)
7 injunction indirectly in a way that makes no sense if you think
8 about what the Court is doing in the first instance. I mean,
9 no court order is ever final until time for appeal has expired.

10 THE COURT: Oh, no, that's not correct. The orders
11 are final, and to the extent that there is no stay of those
12 orders and they're not reversed on appeal. They're only not
13 final if they're reversed.

14 MR. LOCKWOOD: Okay.

15 THE COURT: But, this statute says specifically that
16 the injunction is not effective until after the time for appeal
17 has expired. There's a specific provision in 524(g) to that
18 effect.

19 MR. DONLEY: Your Honor, it's John Donley on behalf
20 of the debtors. I'd just like to join Mr. Lockwood's point,
21 briefly. My reading of the record in all the 524(g) cases has
22 been that the Bankruptcy Court's orders, and indeed your own
23 orders, Your Honor --

24 THE COURT: No, Mr. Donley, I don't think that's
25 correct. In fact, I started off these processes by adding

1 footnotes indicating that to the extent it was core it was
2 final, and to the extent it wasn't core it wasn't. And in
3 every single case that I can recall, I have recommended to the
4 District Court that it issue -- I think in one case I may have
5 actually asked the District Court to affirm as opposed to
6 confirm, but the other cases, they've been reports and
7 recommendations. So, I didn't appreciate that this was going
8 to be an issue.

9 And, folks, you know, I hope I have core
10 jurisdiction. It would make my life a lot easier for the
11 couple cases I still have to address this in. But, if I don't,
12 and I'm wrong, what's the consequence?

13 MR. LOCKWOOD: Well, for openers, Your Honor, I went
14 back and looked at the Owens Corning confirmation order and it
15 wasn't a recommendations, and I looked at the Kaiser
16 confirmation order that Your Honor entered, and it wasn't
17 recommendations. And I looked at the Federal Mogul order and
18 it wasn't a confirmation. And I don't believe there's any
19 decided case that's ever concluded that the 524(g) injunction
20 wasn't a core matter. The fact that the injunction may not be
21 final and definitive until it's affirmed by the District Court
22 is not in and of itself something that says it's either core or
23 non-core. It's just a sort of a condition to ultimate
24 enforceability of the injunction that requires action by the
25 District Court. But, that's not the same issue as to whether

1 something's core or non-core it seems to me.

2 THE COURT: Well, Mr. Lockwood, I hope you're right.
3 But, nonetheless, the way I wrote this one was as a report and
4 recommendation. So, if everyone agrees that I should change it
5 to do a confirmation order and let your appeals run instead,
6 I'm happy to do that. I don't have a dog in this fight. If
7 you're all convinced that it can be done that way, it's fine
8 with me. I just want you folks to get to the point where you
9 can raise whatever issues, either on appeal or by objection,
10 that you need to raise, so that at one point in time or
11 another, hopefully soon, this case can actually end. And your
12 clients can get what it is that they've been looking for for
13 the last ten years. That's all. And how is has to be
14 effectuated, I really don't care. I'd just like to get it
15 effectuated. But, I don't want somebody to lose substantial
16 rights in the event that I have a misinterpretation.

17 MR. DONLEY: Your Honor, John Donley again. We
18 really do believe it's core and did go back and read those
19 cases, and there was a cover letter in one from Your Honor to
20 the District Court saying you recommended that the findings be
21 affirmed. But, they were all entered as core cases and final
22 orders, and no parties were prejudiced because they all had the
23 right to file notices of appeal within 14 days and they did.
24 And to us, it really should be the same thing here and we'd
25 urge the Court to follow that same practice here.

1 THE COURT: Well, there was also a distinction in at
2 least a couple of those cases, Mr. Donley, and that is that by
3 the time I got to the confirmation order there were no
4 objections left except in some instances the insurance
5 assignment issues. And so everybody agreed with the
6 proposition. So, I didn't need to take it on. I wasn't -- I
7 just didn't think that that was the case here. If it is, as I
8 said, I'm happy to issue a corrective order. I still have
9 jurisdiction over it. You know, I've sent it to the District
10 Court, but he hasn't done anything that assumes jurisdiction
11 yet. He scheduled a status conference. So, if you all want me
12 to do this differently and amend what I did to say that I'm
13 issuing the injunction, I'm confirming the plan and would the
14 District Court please affirm it, then I will do that. As long
15 as all your clients' rights are protected, I'm happy with that.

16 So, let me hear from anybody who doesn't want that
17 done.

18 MS. CASEY: Your Honor, this is Linda Casey on behalf
19 of BNSF. Whether Your Honor said that the final order or not,
20 BNSF doesn't take a position on. We did file a pleading that
21 was filed shortly before this hearing, and I'm sure you didn't
22 receive it yet. BNSF did file a motion to reconsider. And if
23 the order were a final order, 8002(b) -- Bankruptcy Rule
24 8002(b) provides that if any party makes a timely motion, the
25 time for appeal for all parties runs until the entry of the

1 order disposing the motion. So, I believe even if it is a
2 final order, what was filed on January 31st is a final order,
3 the motion for all parties to appeal has been tolled, for want
4 of a better word, by our filing the motion to reconsider.

5 However, the one concern we do have is filing -- the
6 debtors requested sort of a retroactive decision all the way
7 back to January 31st as to whether this is something we need to
8 appeal or object to, and BNSF's pleading that we filed in
9 response to that is, whatever does happen has to preserve
10 parties' rights. And we can't have an order entered on the
11 last day of the appeal period or objection period tell us what
12 that day is. We would need additional time to be able to
13 respond.

14 THE COURT: Well, I agree with that, Ms. Casey. I
15 certainly don't think I can, you know -- well, in fact, I
16 probably wouldn't even get an order entered until Monday at
17 this point, in any event. So, I certainly think that if I
18 enter an order that modifies what I did before to say, oh, by
19 the way, this is a final order, that your time to appeal would
20 not run until that order is docketed. But, if Rule 8002(b)
21 indicates that your motion for reconsideration has tolled that
22 time for everyone, then I don't think it's so much of an issue
23 anyway.

24 MR. SHINER: Your Honor, this is Michael Shiner. We
25 had filed on behalf of AXA the motion to extend both the appeal

1 and 9033 time frame. And I do agree with Ms. Casey's statement
2 that, you know, the filing of any one motion for
3 reconsideration under 9024 that BNSF has filed, essentially
4 tolls the appeal period for -- you know, for all parties.

5 THE COURT: Okay. Let me go back to my initial
6 question. I don't think everyone is represented on the phone,
7 I mean, not all parties, but certainly the major constituents
8 are. Many of the insurance companies are not here.

9 MR. LOCKWOOD: Your Honor, the only ones that are
10 still objecting to the plan, I believe, are here.

11 THE COURT: Well, that's what I was going to ask.

12 MR. LOCKWOOD: I heard Geico, Republic, Axa Belgium
13 and Maryland Casualty and Arrowwood and I don't believe that
14 there's anybody else that's a plan objector, unless CNA would
15 fit that description. But, they've agreed -- the Court has
16 approved their settlement and they've agreed to withdraw their
17 objection. So --

18 THE COURT: No, I don't think --

19 MS. BAER: Your Honor, this is Janet Baer on behalf
20 of the debtors.

21 When we created the e-mail list, we actually went
22 back and made sure that each and every plan objector was
23 included on this call, and I'm not aware of somebody who is not
24 on it, but they certainly were included in the list.

25 THE COURT: All right. Then let me ask one more

1 time, if everybody is on the phone, do you want an amended
2 order that indicates that the plan confirmation is final that I
3 am issuing a 524(g) injunction and --

4 MR. MONACO: Your Honor, this is Frank Monaco. And I
5 apologize. There's a fire emergency in our building and we're
6 asked to evacuate, of all times. We do object to the relief
7 sought by the plan proponents. We do not think it should be a
8 final order. We agree with Your Honor's analysis. And I can
9 dial back in once I get outside (indiscernible). I apologize.

10 THE COURT: Okay, thank you.

11 MR. MONACO: I'm going to have to get off the call.
12 I'm sorry.

13 MR. ROSENDORF: Your Honor, this is David Rosendorf
14 on behalf of Anderson. I will be candid in telling you, Your
15 Honor, that I had not yet evaluated whether my client has a
16 position on whether the Court has the authority to enter a
17 final order with respect to all these issues or not, because we
18 did not believe that that issue was really adequately teed up
19 at this point other than that we were seeking clarification of
20 it ourselves in the motion that we filed.

21 It seems to me the plan proponents have requested
22 clarification of this Court's order. The clarification that
23 the Court gave today was not necessarily the clarification that
24 they wanted. If the Court -- if the plan proponents are asking
25 the Court to do something else, I believe that that has to come

1 by means of a motion for reconsideration or to alter findings
2 with respect to the Court's orders that it did enter, in which
3 case parties could then have an opportunity to respond to them.
4 I just can't do so today with -- you know, really with no
5 motion teed up at this point.

6 THE COURT: Well, I'm not modifying the findings at
7 this point. I mean, I know BNSF has asked me to look at a
8 couple findings, and when people have a chance to respond to
9 that I certainly will look at those couple of findings. I
10 don't want to have misunderstood something. And if I did, I
11 appreciate the opportunity to get it clarified. But, with
12 respect to the findings, I don't have any intention at this
13 point of changing my findings. They are the findings, whether
14 they are final or whether they are not final is the issue.

15 From my point of view, I mean, I'm not going back to
16 do anything unless the District Court sends it back to me and
17 tell me that there's something that I did wrong and have to
18 redo. So, in my point of view, they're as final as I can make
19 them. I just don't know whether it is within my core or non-
20 core jurisdiction. If it's within my core jurisdiction,
21 they're final by operation of law. If it's within my non-core
22 jurisdiction, I have to make a report and recommendation. And
23 trying to figure it out, as I think is evidenced by this call,
24 is not easy. So, it seems to me that where it's in dispute the
25 best solution is simply not to make a final order, but to

1 recommend that the District Court enter the confirmation order
2 and the injunction, and then you get everything done at one
3 time. That's how I viewed it. But, as I said, I don't have a
4 dog in the fight. It doesn't matter to me, just so you folks
5 get to the District Court level in a fashion that protects your
6 clients' interest, that's the only concern I have. And
7 frankly, I think you're all protected if you can file an
8 appeal. Just like you're all protected if you file objections.
9 The ultimate conclusion is the same, the District Court's going
10 to look at it.

11 (Unrelated dialogue)

12 THE COURT: I'm sorry, whoever's speaking, I can't
13 understand a word you're saying. If you're on a speaker phone
14 you'll have to pick up. Hello?

15 MR. LOCKWOOD: It sounded like there was a fire alarm
16 going off in the background, Your Honor. I don't think they
17 were intending to communicate to you.

18 THE COURT: Oh, okay, thank you.

19 MR. ROSENDORF: Your Honor, in direct answer to your
20 question of whether any party or if all parties consent to the
21 entry of an amended order, I cannot tell you that Anderson does
22 today.

23 THE COURT: Okay. I appreciate that, Mr. Rosendorf.
24 I'm sure no one had necessarily a clue about what this was
25 about. My concern, as I said, is I don't think I can extend

1 the time to file an appeal. But, to the extent that Ms.
2 Casey's client has filed a motion for reconsideration, I think
3 that -- having looked at this rule, I think the time's extended
4 anyway.

5 MR. ROSENDORF: I'd concur with the filing of that
6 motion, certainly that the portion of the motion Anderson filed
7 is not necessary to be addressed at this point.

8 MR. LOCKWOOD: That's the point I was trying to make,
9 Your Honor, at the beginning of the call about BNSF's filing.

10 THE COURT: Okay.

11 MR. DONLEY: Just -- John Donley for the debtors
12 again, Your Honor -- the one thing that was said that we do
13 disagree with, we don't think a Rule 9023 motion to amend or
14 alter is necessary. We think the Court has inherent power to
15 interpret its own order. And we really do think that all the
16 parties' rights are preserved by the notice of appeal process,
17 and the timing may be affected by the BNSF motion temporarily
18 and really would urge a clarification be entered clarifying
19 that the order and the findings have been made.

20 MR. LOCKWOOD: Your Honor --

21 MR. DONLEY: Notices of appeal in a time will run
22 under the statute when they run.

23 MR. LOCKWOOD: Your Honor, could one way of dealing
24 with this that's consistent with what you've said be just to
25 have you say, in effect, that to the extent that the matters

1 that you've dealt with in your orders are core matters, they're
2 final, and to the extent that they're not, they're not?
3 Because otherwise you're putting -- you're making, in effect, a
4 ruling that says you don't have core jurisdiction to confirm a
5 plan.

6 THE COURT: Oh, no, I think I put a footnote in that
7 indicated the plan confirmation is clearly core. I mean,
8 that's one of the listed things in 157. The difficulty isn't
9 whether I have core jurisdiction over the plan, it's the effect
10 of issuing the injunction. And I don't know how to issue the
11 injunction as non-core, which I understand your argument, Mr.
12 Lockwood. I maybe need to think about it, but nonetheless, as
13 I understood it when I issued this order, without the agreement
14 of the parties I don't know how to do the 524(g) injunction as
15 a non-core matter without doing a report and recommendation,
16 and at the same time issue a final order with respect to
17 confirmation without bifurcating the whole proceeding for
18 everyone. And it seemed to me that that didn't make sense.
19 So, the thing that made most sense was simply to do a report
20 and recommendation as to everything and let the District Court
21 enter the final order so that it could then be appealed to the
22 Circuit. That's what I thought I was doing.

23 MR. LOCKWOOD: The problem with that from a technical
24 point of view, Your Honor, is that you have -- I mean, as you
25 said, the confirmation order is a core matter. So, you don't,

1 under the statute you can't recommend to the District Court
2 that it decide something that's before you as a core matter.
3 The District Court would instead have to withdraw the
4 reference, which it made in the beginning of the case to you.
5 So, one of the things that the plan proponents are concerned
6 about is, we're going to be in front of Judge Buckwalter on
7 Wednesday, if we go forward as scheduled, and we're concerned
8 that he isn't going to have the vaguest idea of what he's
9 expected to do, because if he reads the statute, he'll see that
10 it says confirmation of a plan is a core matter. And there's
11 nothing in your orders to date that explain any of the
12 reasoning that you've articulated here today to us as to why
13 it's a piece of what's going on here that you think may not be
14 core. But, there's a whole bunch of other aspects, such as the
15 confirmation order itself that you believe are core, and
16 therefore under the way the statutory framework is set up,
17 wouldn't be a proper subject for you to be making
18 recommendations on. I mean, you're the Judge that, you know,
19 has the authority to rule on that, and the District Court
20 referred the case to you for that purpose.

21 THE COURT: Well, I agree that it's a conundrum, Mr.
22 Lockwood. I thought I had done what I could to straighten it
23 out. Maybe not. As I said earlier, if the parties agree,
24 apparently Mr. Monaco's client doesn't, that this is a final
25 order, I have no problem issuing an amendment to indicate that

1 it's a final order.

2 With BNSF having filed a motion for reconsideration
3 that isn't even on the calendar for Monday, it's on for March,
4 I think, sometime, why don't you all get together before the
5 hearing on Monday and let me know what your clients' positions
6 are. And I will make a ruling at that time, and I will do some
7 research in the meantime. If I think that there's a way that I
8 can amend this to indicate that it's a final order and that I'm
9 asking the District Court to affirm it and to affirm the
10 injunction, I'll do that. If I think I can't, then I'll tell
11 you why and I'll go forward with it the way it is now as what I
12 thought was a report and recommendation. So, talk to your
13 clients, we will address this Monday at the time scheduled for
14 the Grace hearing.

15 MR. ROSENBERG: Your Honor, it's Andrew Rosenberg.

16 One other thing. Just in terms of extension of time,
17 I think if this ends up as 9033, that time does run on Monday,
18 and we were going to ask the Court for a brief extension to at
19 least get us past the District Court status conference on
20 Wednesday before we start adding more confusion to this by
21 starting to file 9033, you know, objections to findings of fact
22 and conclusions of law, which we'd have to file on Monday.

23 THE COURT: Well, that I don't have any problem with
24 granting you, because I have the authority under Rule 9033 to
25 grant that extension. So, tell me a date by which you want

1 that and I'll simply enter an order at this point that grants
2 the 9033 extension. But, as I said, I don't think I have the
3 authority to grant an appeal extension.

4 MR. ROSENBERG: Another week I think would be fine
5 for us, for the bank lenders.

6 MR. SHINER: Your Honor, Michael Shiner.

7 We had asked for two weeks in our motion on the 9033
8 side. We would appreciate that date.

9 THE COURT: All right. Why don't I make it until
10 February 28th. Is that sufficient? That's a week and a half
11 after your hearing with the District Court Judge, and he can
12 extend it further if he feels it is necessary.

13 MR. SHINER: That's great. Thank you.

14 MR. MONACO: Your Honor, this is Frank Monaco. I
15 apologize. I promise it was not a delaying tactic. They made
16 us evacuate the building and I'm now standing outside the
17 building.

18 I don't know what I've missed, but I'm happy to
19 repeat what I was trying to say, started to say.

20 THE COURT: What I was about to do, Mr. Monaco, was
21 extend the time to file the 9033 motions until February 28th,
22 which gets you all past the status conference that Judge
23 Buckwalter has entered. That way at least before him you can
24 decide what you need to file. I indicated that I'd take this
25 same issue as to whether I can or cannot enter a final order on

1 all matters and then ask the judge to affirm them rather than
2 to enter the confirmation order up again on Monday, at the time
3 it's scheduled for the Grace hearing to give you all time to
4 confer with your clients.

5 Frankly, Mr. Monaco, I don't see how anybody is
6 prejudiced by my entering a final order, getting it docketed,
7 say Monday, and then giving you appeal times from there on. I
8 mean, the District Court's going to hear this whether it's by
9 way of 9033 objections or an appeal, you're going to get a
10 briefing schedule if he determines you need one. So, I don't
11 see that it makes a difference. He's going to do what he
12 thinks he needs to do regardless of the context in which he
13 gets it. So, if your clients aren't prejudiced by the time
14 delay, I simply don't see what difference it makes.

15 MR. MONACO: Well, Your Honor, I guess the practical
16 effect is, who do we appeal from. If the plan proponents are
17 right and this is deemed the final order, I guess we would
18 appeal to the District Court. But, if you're making
19 recommendations and asking the District Court to make the final
20 call on this and enter an order, it seems to me we go to the
21 Third Circuit. And that --

22 THE COURT: Well, you go to the Third Circuit after
23 the District Court anyway. The fact is, you're going to the
24 District Court first. Whether you go there by 9033 or whether
25 you go there by appeal, you're going to the District Court.

1 And if you don't like what he does, you're going to the
2 Circuit. So what difference does it make whether you go there
3 by appeal or by 9033 motions?

4 MR. MONACO: Well, Your Honor, I just want to make
5 sure the procedure is followed correctly.

6 THE COURT: I do, too, Mr. Monaco. That's the reason
7 I did what I did. But, maybe I made it more confusing rather
8 than less.

9 MR. DONLEY: Your Honor, John Donley for the debtors.

10 Again, on the deadlines I wanted to raise one other
11 issue briefly. BNSF's motion for reconsideration was noticed
12 for March 28th. And we're, as you know, very eager to move
13 forward with the process as expeditiously as possible, and that
14 is a long time, so I know we'll be before you Monday and we can
15 perhaps make a specific proposal and talk to Ms. Casey about
16 streamlining that. But, we would be very, very eager to move
17 up -- move that date up. It's a discreet, specific point, and
18 to have the whole case delayed two months almost until March
19 28th, we'd like to move that up if we could.

20 THE COURT: Well, I don't have a problem moving it up
21 if Ms. Casey doesn't have a problem. But, it seems to me that
22 until you go past your status conference with the District
23 Court, maybe having it out there is not a bad thing for all of
24 you. So, that this confusion doesn't bar anybody's rights to
25 either seek a 9033 or to file an appeal.

1 If I can enter an order on Monday that is a final
2 order, than actually you're time to appeal would be, I think,
3 March 1st, if I'm looking at the calendar correctly, rather
4 than February 28th anyway. So, the time frame would still work
5 out the same.

6 Okay. So, why don't you talk to your clients and
7 find out, you know, I honestly am having some difficulty
8 understanding what the difference would be if you have to go to
9 the District Court anyway. So, whether you do it by filing a
10 notice of appeal or objections, all of which are going to go
11 the District Court anyhow, I just don't see the difference.

12 MR. HOGAN: Your Honor, Dan Hogan here on behalf of
13 the Canadian Zonolite claimants.

14 You recall that we did an amendment to the minutes of
15 settlement and it was tied to the date of the confirmation
16 order. And so this really isn't necessarily an appeal issue,
17 but the agreement provided that additional compensation would
18 be paid to the fund in the event that the confirmation order
19 wasn't entered on or before January 31st. And so to the extent
20 that you enter an order that relates back, I've got a question
21 about whether -- you know, you asked about prejudice to any
22 constituency, arguably there may be a prejudice to the Canadian
23 Zonolite claimants.

24 THE COURT: Well, maybe, Mr. Hogan. My view with
25 respect to the confirmation of the plan is, I think I confirmed

1 the plan and ask -- I entered all the findings and then I
2 recommended that Judge Buckwalter actually confirm the plan
3 because I thought that was the appropriate thing to do. I
4 think I can make the findings in the confirmation retroactive,
5 but I can't restart the appeal period. I simply can't do that.
6 So, I don't know. Why don't you, Mr. Hogan, talk to the debtor
7 and see if that issue can't be resolved somehow. You were
8 successful in getting other extensions when you needed to, and
9 it seems to me that that should not be that much of a sticking
10 point.

11 MR. DONLEY: Your Honor, just briefly for the
12 debtors. This is John Donley. We don't think it's a sticking
13 point at all, and we don't think it's a question of making
14 anything retroactive. We think it's crystal clear that on
15 January 31st Your Honor entered a confirmation order. And to
16 suggest that there's any impact on the Canadian settlement we
17 think is just wrong. And if there needs to be a clarification
18 from Your Honor, that's fine, but I don't think it's doing
19 anything retroactive. It would just be clarifying what Your
20 Honor, in fact, did on January 31.

21 MR. LOCKWOOD: And because BNSF has filed a timely
22 notice of -- motion to reconsider, as Ms. Casey pointed out,
23 everybody's time to appeal has been extended until that motion
24 is resolved, so nobody could possibly be prejudiced by having
25 the Court clarify that the confirmation order was entered on

1 January 31st, except perhaps the opportunistic attempt by the
2 Canadian ZAI claimants to try and get another half million
3 dollars on the grounds that the confirmation order wasn't
4 entered on January 31st.

5 MR. HOGAN: I take umbrage with that statement, Mr.
6 Lockwood. I mean, this was a negotiated agreement and we're
7 just trying to avail ourselves of our rights that we negotiated
8 for, pursuant to the terms of the agreement. So, opportunistic
9 I think is unfair.

10 THE COURT: Okay. Folks, if you would, address me,
11 and let's not get into name calling. I mean, it's to the point
12 where this plan is actually done. So, I mean, there may be
13 some tweaking that has to go on, you may have some legal issues
14 that will be addressed by the District Court, but essentially
15 the plan's done. I think you can work this issue out.

16 As I indicated, if there is a way that I can say that
17 it's a final order and that I can issue the injunction, that's
18 the issue, can I issue the injunction in a fashion that doesn't
19 require a report and recommendation. I clearly can issue a
20 confirmation order that doesn't require a report and
21 recommendation. In fact, I think I have to do that. But, I
22 can't issue, I think, the injunction in that fashion. If I'm
23 wrong, then fine, you folks, I don't see how there's any
24 prejudice in terms of the appeal rights that your clients have
25 because you'll get to the same place anyway. If I can issue

1 the injunction as a core matter without making a report and
2 recommendation, I'm happy to do that. I'm happy to clarify
3 that that's what I did and to amend the order to ask the
4 District Court to affirm and to enter that order so that the
5 appeal period will start to run. Well, it doesn't matter.
6 With BNSF's motion there, it really doesn't matter. The appeal
7 period is tolled anyway, even if I enter a new order on Monday
8 it's still tolled.

9 So, I'm really at a loss to see what difference my
10 determining that it's final is going to have on the process.
11 Whether it has some impact on the Canadian Zonolite claimants,
12 that I'm not prepared to address. But, that's not my concern
13 right now. My concern is making sure that peoples' and
14 entities' appeal rights are preserved appropriately.

15 Okay, we'll readress this on Monday then to see
16 whether or not there's some agreement. Ms. Baer, why don't you
17 prepare a proposed order and bring it to court so that to the
18 extent there is some agreement or that I can make a
19 determination I at least have something to write on, and that
20 way I can get some order docketed on Monday.

21 Mr. Shiner, I will, in part grant, your motion, which
22 is essentially the same as Mr. Rosendorf's. It extends the
23 time for the 9033 motions to be filed until February 28th, and
24 then we can address anything further on Monday.

25 MR. SHINER: Thank you, Your Honor.

1 MS. CASEY: Thank you, Your Honor.

2 THE COURT: Mr. Rosendorf, is that sufficient for
3 you?

4 MR. ROSENDORF: Yes, Your Honor, thank you.

5 THE COURT: All right. Thank you. We're adjourned
6 until Monday.

7 MR. ROSENDORF: Thank you, Your Honor.

8 MR. LOCKWOOD: Thank you, Your Honor.

9 * * * * *

10 **C E R T I F I C A T I O N**

11 I, RITA BERGEN, court approved transcriber, certify
12 that the foregoing is a correct transcript from the official
13 electronic sound recording of the proceedings in the
14 above-entitled matter, and to the best of my ability.

15

16 /s/ Rita Bergen

17 RITA BERGEN

18 J&J COURT TRANSCRIBERS, INC. DATE: February 21, 2011

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